J. C. Penney Company, Inc. *and* Retail and Department Store Employees, Amalgamated Clothing and Textile Workers Union, AFL-CIO. Case 7-CA-19181

4 August 1983

DECISION AND ORDER

BY MEMBERS JENKINS, ZIMMERMAN, AND HUNTER

Upon a charge filed on 10 April 1981 by Retail and Department Store Employees, Amalgamated Clothing and Textile Workers Union, AFL-CIO, herein called the Union, and duly served on J. C. Penney Company, Inc., herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 7, issued a complaint on 14 May 1981 against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge and complaint and notice of hearing before an administrative law judge were duly served on the parties to this proceeding. On 29 May 1981 Respondent filed its answer to the complaint denying the commission of any unfair labor practices and raising certain "affirmative defenses."

On 20 April 1982 all parties entered into a stipulation of relevant facts and jointly petitioned the Board to transfer this proceeding directly to the Board for findings of fact, conclusions of law, and an order based on the record. The parties agreed that the complaint, answer, and stipulation of facts constitute the entire record in this case and that no oral testimony is necessary or desired by any of the parties. The parties further stipulated that they waived a hearing before an administrative law judge and the making of findings of fact and conclusions of law by an administrative law judge's decision. On 18 May 1982 the Board approved the stipulation and transferred the proceeding to the Board. Thereafter, the General Counsel, the Charging Party, and Respondent filed briefs.[1]

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

On the basis of the stipulation, the briefs, and the entire record in this proceeding, the Board makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

J. C. Penney Company, Inc., is, and has been at all times material herein, a corporation duly organized under and existing by virtue of the laws of the State of Delaware, with its principal office and place of business in New York, New York, and other places of business in the States of Michigan, Ohio, Indiana, and other States, where Respondent is engaged in the retail sale of clothing and related products. Its place of business located at Fairlane Shopping Center in Dearborn, Michigan, is the only facility involved in this proceeding. During the calendar year ending 31 December 1980, a representative period, Respondent, in the course and conduct of its business operations, had gross revenues from all sources in excess of $500,000. During the same representative period, Respondent, in the course and conduct of its business operations, purchased and caused to be shipped to its Dearborn, Michigan, facility goods and materials valued in excess of $50,000, which were shipped to said place of business directly from points located outside the State of Michigan.

The parties stipulated, and we find, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATION INVOLVED

Retail and Department Store Employees, Amalgamated Clothing and Textile Workers Union, AFL-CIO, is a labor organization wihtin the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

The parties stipulated that since on or about 14 October 1980 Respondent has distributed to employees at its Fairlane Shopping Center facility employee handbooks which contain the following language:

> Donations/Solicitations
>
> Requests for donations by churches, clubs, etc., should be referred to the receptionists in the office. No solicitation is permitted in the store at any time.

[1] The General Counsel subsequently filed a motion to strike all factual allegations in Respondent's brief which were not set forth specifically in the stipulation of relevant facts. In particular, the General Counsel adverted to Respondent's assertion that "the Company did, in an attempt to voluntarily resolve the issue, withdraw the rule," and to Respondent's discussion of the settlement negotiations. We agree with the General Counsel's contention that Respondent has raised facts which are outside the scope of the stipulation and that such an attempt by Respondent is improper. Accordingly, we hereby grant the General Counsel's motion to strike such factual allegations from Respondent's brief.

The General Counsel contends that, in the absence of any showing of special need, an employer rule that attempts to regulate employee solicitation in nonworking areas during nonworking time is presumptively violative of Section 8(a)(1). *A fortiori*, the General Counsel contends that Respondent has maintained an overly broad no-solicitation rule in violation of Section 8(a)(1).

The Union contends that since Respondent's no-solicitation rule is not restricted to the selling floor it falls outside the range of restrictions on solicitation that are permitted in the case of retail establishments. The Union further contends that there is no proof in the record that Respondent ever rescinded the rule as Respondent asserted in its answer to the complaint. The Union further contends that, even if the rule never was enforced, its mere maintenance warrants the finding of an 8(a)(1) violation and the issuance of an appropriate remedial order.

Respondent contends that its rule, when read as a whole, does not prohibit union solicitation but rather seeks to prevent employees from being solicited for funds by church groups and clubs. In this regard, Respondent argues that the rule speaks only to the solicitation of funds, not union cards, and that it specifically applies only to churches and clubs, not unions. Respondent further asserts that union solicitation went on freely both inside and outside the store by employees and nonemployee organizers alike. Finally, assuming that the rule is overly broad, Respondent contends that any violation based thereon is technical and *de minimis*, thereby justifying dismissal of the complaint.

We agree with the General Counsel and the Union that Respondent has maintained an overly broad no-solicitation rule in violation of Section 8(a)(1). Although the first sentence of the rule refers specifically to "churches" and "clubs," we note that it is not limited to churches and clubs, as indicated by the use of the word "etc." immediately following "clubs." Moreover, although the first sentence refers specifically to "requests for donations," the second sentence provides that "No solicitation is permitted in the store at any time." Thus, the second sentence, by itself, prohibits all types of solicitation, thereby necessarily and implicitly prohibiting union solicitation.[2] Moreover, even when the second sentence is read in conjunction with the first sentence, the most that can be said in Respondent's favor is that the rule becomes ambiguous. However, it is well settled that, where ambiguities appear in work rules promulgated by an employer, the ambiguities must be resolved against the promulgator of the rule rather than the employees who are required to obey it.[3] Thus, in the instant case, "employees may reasonably construe the rule to mean exactly what the [second] sentence states, thereby, prohibiting employees from exercising their Section 7 rights to engage in permissible union solicitation."[4] Accordingly, we find, contrary to Respondent's contention, that the rule reasonably may be read to apply to, and prohibit, union solicitation.[5]

We further find that the time and place restrictions of the rule are clearly overly broad. It is well settled that restrictions on union solicitation in nonworking areas during nonworking time are presumptively invalid.[6] It is equally well settled that in the case of retail establishments an employer may prohibit solicitation in the selling areas of a retail store even when employees are on their own time.[7] Thus, since Respondent operates a retail store, it lawfully could have restricted all solicitation on the selling floor.[8] Respondent's rule, however, flatly and broadly prohibits solicitation "in the store at any time" and therefore is not specifically limited to the selling floor. No justification for so broad a restriction on solicitation has been claimed or proven. Therefore, since the rule appears to include nonselling areas in those areas where solicitation is prohibited during nonworking time, we conclude that it is unlawfully broad and invalid.[9]

In so concluding, we reject Respondent's arguments that any violation based on the rule is *de minimis* and, as such, warrants dismissal of the complaint. Although Respondent asserted in its answer to the complaint that the rule no longer was in existence, we note that the stipulated record contains no evidence of the elimination of the rule or that such alleged elimination was ever communicated to employees. Moreover, with regard to Respondent's assertion in its brief that the rule never was enforced, we note that it is well established that the mere maintenance of such a rule serves to inhibit employees from engaging in otherwise protected organizational activity, and, therefore, the absence of evidence of enforcement of a rule does

[2] We note that in its brief, Respondent in effect concedes that the second sentence of the rule, read alone, is overly broad under current Board law.

[3] See *Paceco*, 237 NLRB 399, 400 (1978); *Farah Mfg. Co.*, 187 NLRB 601, 602 (1970).

[4] *Paceco, supra*, 237 NLRB at 400.

[5] See also *Mallory Battery Co.*, 239 NLRB 204 (1978).

[6] *Stoddard-Quirk Mfg. Co.*, 138 NLRB 615 (1962).

[7] See, e.g., *May Department Stores*, 59 NLRB 976 (1944), enfd. as modified 154 F.2d 533 (8th Cir. 1946); *Marshall Field & Co.*, 98 NLRB 88 (1952), enfd. 200 F.2d 375 (7th Cir. 1953); *Alberts, Inc.*, 213 NLRB 686 (1974), enfd. 543 F.2d 417 (D.C. Cir. 1976); *McBride's of Naylor Road*, 229 NLRB 795 (1977).

[8] See *J. C. Penney Co.*, 193 NLRB 684, 686 (1971).

[9] *Alberts, supra; McBride's, supra.*

not preclude the finding of a violation or the issuance of a remedial order.[10]

Accordingly, for all of the foregoing reasons, we conclude that, by maintaining an overly broad no-solicitation rule in its employee handbook, Respondent has violated Section 8(a)(1) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

Upon the basis of the foregoing findings of fact, conclusions of law, and the entire record, we make the following:

CONCLUSIONS OF LAW

1. J. C. Penney Company, Inc., is an employer engaged in commerce within the meaning of Section 2(b) and (7) of the Act.
2. Retail and Department Store Employees, Amalgamated Clothing and Textile Workers Union, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.
3. By maintaining in its employee hanbook a rule which provides that no solicitation is permitted in its store at any time, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.
4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act, we shall order that it cease and desist therefrom and take certain affirmative action in order to effectuate the policies of the Act.

ORDER

The Respondent, J. C. Penney Company, Inc., Dearborn, Michigan, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Maintaining in its handbook any rule which provides that no solicitation is permitted in its store at any time.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Rescind the rule in its employee handbook providing that no solicitation is permitted in its store at any time.

(b) Post at its store in Dearborn, Michigan, copies of the attached notice marked "Appendix."[11] Copies of said notice, on forms provided by the Regional Director for Region 7, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are no altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 7, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT maintain in our employee handbook any rule which provides that no solicitation will be permitted in our store at any time.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act.

WE WILL rescind the rule in our employee handbook which provides that no solicitation will be permitted in our store at any time.

J. C. PENNEY COMPANY, INC.

[10] *Farah Mfg., supra*, 187 NLRB at 602; *Paceco, supra*, 237 NLRB at 401; *Mini-Industries*, 255 NLRB 995, 1002 (1981).

Member Hunter notes that Respondent's assertion in its brief that union solication went on freely at the store is unsupported by, and beyond the scope of, the stipulated facts. He therefore finds it unnecessary on this record to pass on the issue of whether the lack of enforcement of such a rule would insulate it from the proscription of the Act.

[11] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."